UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CORESLAB STRUCTURES (TULSA) INC.	Cases: 14-CA-248354 14-CA-248812
and	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 627, AFL-CIO	

CORESLAB STRUCTURES (TULSA) INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE ROBERT A. RINGLER'S DECISION AND REQUEST FOR ORAL ARGUMENT

DATED: April 20, 2021

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INTRODUCTION

Respondent Coreslab Structure (Tulsa), Inc. ("Coreslab," "Respondent," or the "Company"), pursuant to Rule 102.46 of the National Labor Relations Board's ("NLRB's" or "Board's") rules, respectfully submits this brief in support of its contemporaneously filed Exceptions to the decision of Administrative Law Judge ("ALJ") Robert A. Ringler, dated February 11, 2021 ("Decision"). The ALJ erred in concluding that Respondent engaged in unfair labor practices within the meaning of Section 8(a) of the National Labor Relations Act (the "Act" or "NLRA") by (1) barring an employee from talking to the International Union of Operating Engineers, Local 627, AFL-CIO (the "Union") during non-working time in a non-working area; (2) excluding certain bargaining unit employees from a profit sharing plan; (3) failing to provide certain information to the Union; (4) unilaterally changing established terms and conditions of employment of its employees by offering a profit sharing plan since 2005 or 2011 to those members of the bargaining unit, who were not Union members, without providing the Union prior notice or an opportunity to bargain to an agreement or impasse; (5) failing and refusing to bargain in good faith with the Union during collective bargaining over a successor agreement; and (6) withdrawing recognition from the Union as the bargaining representative of its employees at its Tulsa, Oklahoma facility on September 24, 2019.

As set forth below, the ALJ's decision is premised in large part on a profoundly erroneous finding that is refuted by the record: specifically, the ALJ wrongly concluded that beginning in 2005[1] the Company offered a profit-sharing plan to its employees who are non-Union-members

[1] As set forth below, the ALJ got the year wrong. The uncontested evidence shows that the Company's profit-sharing and pension contribution practices at issue here were actually in place since *2005*, not 2011. *Compare* Decision at 2 ("Coreslab unilaterally decided in 2011 to provide profit sharing monies to the same Unit members that were secretly excluded from the pension (i.e., those Unit employees, who were not Union members).") *with* Tr. 527:7-14 ("[D]uring the time that you had the position in the bargaining unit and you were Union Steward, did you become aware of the Company making profit-sharing payments to any employees that were in the bargaining unit?," "Yes.," "Okay. Do you remember when that was?," "It was in 2005.").

secretly and *covertly*. In fact, as demonstrated by the record, the Company was *open* and *transparent* about its offering profit-sharing to those employees who were not members of the Union. One of the Union's own former stewards, Floyd Prince, *admitted* (1) that he was aware of the profit-sharing plan since 2005, (2) that the Company openly disclosed the existence of this plan to him in 2005 and discussed it with him and with another Union steward (Tim Merrill) at that time, and (3) that they, in turn, discussed the plan with employees who were Union-members. Tr. 527:7-25; 529:5-530:22. Moreover, during the annual March safety meetings, the Company distributed profit sharing payments to non-Union members in the Union stewards' presence. Tr. 532:13 – 534:25. That is contrary to the ALJ's unsupportable findings, and the record shows that the Company *made no effort to hide the plan or keep it secret from the Union and its members*.

Moreover, the record further shows, contrary to the ALJ's insupportable findings, that the Company did not implement the plan with any nefarious, anti-union purpose or animus. Rather, the record shows that the Company was under the impression that those employees who were not dues-paying members of the Union were ineligible for the Union's pension plan. *See* Tr. 212:21-214:7; 527:17-25. Thus, *as former Union Steward Prince admitted*, the Company rolled out the profit-sharing plan "to make it fair" and "to try to make it equal," that is, to provide some pension-like benefit to non-Union-members since the Company believed those employees were not eligible for the Union pension plan. Tr. 527:7-528:8. Former Union Steward Prince, who acknowledged that he had known of the Company's profit-sharing plan for non-Union-members since 2005, stated the Union never filed any grievances over the profit-sharing plan but rather that he "thought it was pretty nice of them, actually" and "[w]e didn't have a problem with it." Tr. 527:7-14; 527:22-25; 528:1-531:25.

These profound errors by the ALJ – that is, his incorrectly finding that the Company created and maintained this profit-sharing plan in secret for anti-Union purposes and his ignoring the Company's disclosure of this plan to the Union stewards based on the Company's belief non-Union-members were ineligible for the Union pension plan – infected nearly every aspect of the ALJ's erroneous decision, including his conclusions about whether the six-month statute of limitations barred much of the ULP claims, whether the Company discriminated against Union-members with animus, and whether the employees' disaffection petition was improperly influence by the Company, among other findings.

The ALJ's findings are unsupported by the record, contrary to law, and should be reversed.

STATEMENT OF THE CASE

I. The Union's Unfair Labor Practice Charges

These cases relate to two unfair labor practice charges filed by the Union. Prior to the present unfair labor practice charges, Coreslab Structures (Tulsa) Inc. and the Union had a long-standing productive labor-management relationship. Indeed, the parties enjoyed labor peace from at least 2011 until September 17, 2019, when the Union first filed an unfair labor practice charge.[2]

- **The Disaffection Petition**

On September 11, 2019, a bargaining unit employee approached Coreslab's General Manager Neil Drews and presented him with a disaffection petition, signed by 18 out of 26 employees in the bargaining unit. J-16; Tr. 249, 405.

- **Case Number 14-CA-248354**

[2] References to the ALJ's Decision are identified by the letter "D" followed by page and line number, e.g., "D. ___:___." References to the hearing transcript are by the letters "Tr." followed by page and line number, e.g., "Tr. ___:___." References to exhibits introduced by the General Counsel are by the letters "GC" followed by exhibit number, e.g., "GC- ___". References to exhibits introduced Jointly are by the letter "J" followed by exhibit number, e.g., "J- ___."

Six days after Drews received the unsolicited disaffection petition, on September 17, 2019, in Case 14-CA-248354, the Union claimed for the first time that Coreslab violated the Act by:

1. Offering profit sharing to bargaining unit employees who chose not to become members of the Union in order to discourage union membership or union activities.

2. Made unilateral changes to benefits and engaged in bad faith and regressive bargaining for a successor collective bargaining agreement.

3. Interfered with, and restrained its **employees** by unlawfully restricting the Union's access to employees.

4. Failed and refused to provide to the Union relevant and necessary information it requested.

- **Case Number 14-CA-248812**

The Union subsequently filed Case 14-CA-248812 on September 25, 2019. This Charge alleged Coreslab violated the Act by withdrawing recognition from the Union.

II. Region 14's Consolidation of Cases, the Hearing, and the ALJ's Decision

On December 26, 2019, the Region issued a Consolidated Complaint. Case Nos. 14-CA-248354 and 14-CA-248812 were consolidated and were set to be heard on March 17, 2020.

The Consolidated Complaint alleges Coreslab violated Sections 8(a)(1), (3) and (5), and 8(d) of the Act by:

1. Barring employees from speaking with Union representatives during non-working time in non-working areas;

2. Unilaterally and discriminatorily terminating contractual pension plan benefits for certain employees;

3. Unilaterally and discriminatorily providing profit sharing benefits to certain employees;

4. Failing to provide relevant requested information to the Union;

5. Failing to bargain in good faith with the Union over a successor collective bargaining agreement;

6. Withdrawing its recognition of the Union as the exclusive collective bargaining representative of its employees.

After rescheduling due to the global pandemic, a videoconference hearing was held to address the merits of the Amended Consolidated Complaint ("Complaint") on November 9, 10, and 12, 2020.

The Administrative Law Judge ("ALJ") issued his Decision on February 11, 2021. Coreslab now excepts to the ALJ's Decision, as well as to his findings, rulings, and conclusions on matters presented prior to, during, and after the hearing. As discussed in Coreslab's Exceptions and this supporting Brief, the ALJ's rulings, analyses, findings, conclusions, and proposed remedial order are unsupported by the record evidence and controlling legal standards, and are contrary to the purposes of the Act. The Decision must be overturned.

QUESTIONS INVOLVED

This case presents the following questions:

1. Were the charges relating to the Company's profit-sharing plan and pension contributions practices, which had been in place since 2005, barred by Section 10(b)'s six-month statute of limitations? (Complaint, ¶ 6(a)-(c)) (Exceptions 4-27).

2. Did the GC establish by a preponderance of the evidence that the Union was unaware that Coreslab Structures (Tulsa) bargaining unit employees participated either in the Union-sponsored pension plan or Employer-sponsored profit sharing plan? (Complaint, ¶ 8(a)-(h)) (Exceptions 4-27):

3. Did the GC establish by a preponderance of the evidence that Neil Drews ("Drews"), did not sufficiently respond to the Union's September 16, 2019, request for information? (Complaint, ¶ 9(a)-(c)) (Exceptions 4-27).

4. Did the GC establish by a preponderance of the evidence that Coreslab failed to bargain in good faith over a successor agreement? (Complaint, ¶ 11(a)-(c)) (Exceptions 4-27)

5. Did the GC establish by a preponderance of the evidence that unremedied ULPs prompted the disaffection petition. (Complaint, ¶ 10) (Exceptions 4-27)

6. Did the GC establish by a preponderance of the evidence that Coreslab would have excluded members from profit sharing absent their alleged protected activity? (Exceptions 4-27).

7. Did the GC establish by a preponderance of the evidence that Plant Manager Danny Johnson barred a non-Coreslab employee from talking to Union Business Agent Justin Evans during non-working time in the breakroom? (Complaint, ¶ 5) (Exceptions 4-27).

8. Did the ALJ's Decision, conclusions, and proposed remedies properly consider the record evidence and legal precedent? (Exceptions 4-27).

The undisputed facts and applicable legal authorities require a resounding "no" to each of the questions above.

ARGUMENT

I. REQUEST FOR ORAL ARGUMENT

Coreslab respectfully requests oral argument on its Exceptions. Oral argument will assist the National Labor Relations Board's ("NLRB" or the "Board") understanding of the case in several respects. Due to the volume of the record and the sheer number of allegations and issues presented, oral argument will aid the Board's overall understanding of the case. Further, a number of the ALJ's rulings (*e.g.*, shutting down relevant lines of examination) foreclosed Coreslab from developing a complete record. Oral argument would permit a fuller exposition and dialogue regarding the significance of the excluded evidence.

II. EXCEPTIONS APPLICABLE TO MULTIPLE FINDINGS, RULINGS, AND CONCLUSIONS OF THE ALJ (EXCEPTIONS 1-3)

The ALJ committed numerous errors that tainted almost every aspect of the ALJ's Decision. While exceptions to the ALJ's findings on various Complaint allegations are discussed in the later sections of this Brief, the following overarching errors regarding witness credibility provide compelling justification to overturn the ALJ's decision.

The Board should overrule an ALJ's credibility resolutions where a clear preponderance of the relevant evidence shows they are incorrect. *Standard Dry Wall Prods.*, 91 NLRB 544 (1950), *enfd*. 188 F.2d 362 (3d Cir. 1951). An ALJ's factual findings as a whole must show that the ALJ

"implicitly resolve[d]" conflicts created by all the evidence in the record. *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir. 1982). And an ALJ may properly resolve credibility disputes implicitly, rather than explicitly, only if his "treatment of the evidence is supported by the record *as a whole*." *NLRB v. Katz's Delicatessen of Houston St., Inc.*, 80 F.3d 755, 765 (2d Cir. 1996) (emphasis added). Indeed, as the Supreme Court has instructed, the Board may not make its determination:

> . . . merely on the basis of evidence which in and of itself justifie[s] it, without taking into account contradictory evidence and evidence from which conflicting inferences could be drawn.

Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

Accordingly, the Board must "take into account whatever in the record fairly detracts from [the] weight" of the ALJ's Decision. *TNS, Inc. v. NLRB*, 296 F.3d 384, 395 (6th Cir. 2002), quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951). It is "not good enough" that the record contain some evidence that could conceivably have supported an ALJ's finding. The *Universal Camera* standard is met only if the ALJ acknowledges and reasonably discusses conflicting evidence in the record. *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 514 (7th Cir. 2003), *citing Scivally v. Sullivan*, 966 F.2d 1070, 1076 (7th Cir. 1992) (holding that "the ALJ must minimally articulate his reasons for crediting or rejecting" evidence); *PPG Aerospace Indus., Inc.*, 353 NLRB 223, 224 (2008) (failure to explain credibility discrepancies resulted in remand of case in part); *Fortuna Enters., L.P.*, 354 NLRB 202, 203 (2009) (failure to make detailed factual findings and credibility resolutions resulted in remand of finding of Section 8(a)(1) violation).

The ALJ's Decision, which is in many instances devoid of citations to the record, fails to acknowledge conflicting evidence in the record, let alone explain why the ALJ resolved all conflicts and credibility issues in favor of the GC's witnesses. Most importantly, the ALJ obviously concluded, contrary to the testimony of former Union Steward Floyd Prince and others,

that the Company made a decision at some point (the ALJ repeatedly and wrongly stated this occurred in 2011) to deceive the Union about the existence of the profit-sharing plan for non-dues-paying members of the Union. *See, e.g.*, Decision at p. 2 ("In 2011, Coreslab inexplicably stopped paying these pension monies on behalf of those Unit employees, who were not Union members. This end run around the CBA was *secretly* undertaken . . . .") (emphasis added), *id*. ("Coreslab unilaterally decided in 2011 to provide profit sharing monies to the same Unit members that were *secretly* excluded from the pension (i.e., those Unit employees, who were not Union members). This second end run around the Union was *covertly* undertaken . . . .") (emphasis added); *id*. at p. 4 ("Drews brought Evans up to speed and, *at long last, revealed* that Coreslab had been *covertly* offering profit sharing to Unit members that were non-members for several years.") (emphasis added); *id*. at p. 5 ("The Union, in an effort to better understand the facets of the *previously unknown* profit sharing policy, emailed this request to Drews . . . .") (emphasis added); *id* at p. 7 ("In 2011, Coreslab unlawfully and *covertly* ceased making pension payments required by the CBA for Unit employees, who were not Union members. The Union *learned about this unilateral change on September 6[, 2019]* (i.e., eight years after implementation).") (emphasis added).

In reaching this conclusion that the Company attempted to deceive the Union about a supposedly secret and covert profit-sharing plan, the ALJ simply ignored evidence that the Company freely disclosed the existence of the profit-sharing plan and its pension contribution practices to then-Union Stewards Prince and Merrill in 2005.[3] For example, Prince testified as follows:

[3] The ALJ, without applying any legal analysis to the facts in this case, suggested that notice to the Union Stewards could not constitute notice to the Union for statute of limitations purposes. *See* Decision at p. 5 n.12 and p. 8 & n.20. That finding was wrong, as set forth below. But even assuming solely for the sake of argument that notice to the Stewards were legally insufficient to trigger the running of the statute of limitations, the ALJ still ignored the fact that the Company was, as a factual matter, open and transparent with the Union Stewards about the existence of the profit-sharing plan and its pension contribution practices *since 2005*. That openness was the very opposite of secretive and covert conduct.

Q Now, when you were -- during the time that you had the position in the bargaining unit and you were Union Steward, did you become aware of the Company making profit-sharing payments to any employees that were in the bargaining unit?

A Yes.

Q Okay. Do you remember when that was?

A It was in 2005.

Q And how did you become aware of that?

A Jerry Morris talked to me.

Q Okay, what did Mr. Morris say?

…

A He just -- he told me that the Union members got a pension fund, and to make it fair, the Coreslab was giving a profit-sharing so they could put their money into 401(k) or whatever.

Q At that time, did you have any response to Mr. Morris about that?

A Well, I thought it was pretty nice of them, actually. We didn't have a problem with it.

Q Why did you think it was pretty nice of them?

A It gives them, you know -- if you are a Union member, you are getting a pension. They were just trying to make it equal. I thought it was nice.

Q Did the Local file any grievance over the Company deciding to make profit-sharing available to non-union members?

A Not to my knowledge, no.

Q Okay, and did you go and talk to anyone in the Local's Business Office, at that time, about that issue or that subject?

A No, I did not. I don't know what Tim Merrill did, but I did not. We -- we had two Union members at that time, or two Union Stewards.

Q Okay. So, let me just clarify. You had two Union Stewards at the time?

A At the time, right.

. . .

Q Would you give me the name of the other Union Steward, at the time?

A Tim Merrill.

Q Thank you. And was Mr. Merrill aware of the Company making the profit-sharing payments available to -- to the non-union members?

A Yes, sir, he was.

…

Q. Mr. Prince, if you know, how did Mr. Merrill know that the Company was making profit-sharing available to non-union members?

A Well, he knew that -- he was told by Jerry Morris, too.

Q Okay. Was he present --

A We were both told at the same time, so.

Q I understand. And on the pension contributions, how was Mr. Merrill aware of the Company making pension contributions for Union members, if you know?

A He was in the negotiations at that time.

Q Okay. Let's go back to profit-sharing, and I will ask, after Mr. Morris talked to you about profit-sharing be available for non-union members, did you do anything to tell the employees in the bargaining unit about the profit-sharing plan that the Company had?

A Yes, I did. I talked to each and every one of them.

Q Each and every employee in the bargaining unit?

A Yes, sir.

Q Both Union members and non-union members?

A Just the Union members.

Q Okay. And what did -- what did you tell those employees?

A I just told them what Jerry told me, that this is what the Union is providing and this is what the Company was going to provide.

Tr.527:7 -530:22.

The ALJ, without even acknowledging this testimony, simply ignored it without explanation. Indeed, the ALJ did not even credit Mr. Prince's uncontested testimony that the Company's profit-sharing plan and its pension contribution practices had been in place since 2005. Rather, the ALJ inexplicably held that plan and those practices dated from 2011. *See, e.g.*, Decision, p. 2, lines 30 & 36.

From these unsupportable findings that the Company intentionally hid its profit-sharing plan and pension contribution practices for *fourteen years* from an oblivious and unsuspecting Union, the ALJ apparently proceeded to conclude that the Company made a decision at some point to engage in a many-years-long effort to chip away at the Union's dues-paying membership using that allegedly secret profit-sharing plan and then, after having spent nearly a decade-and-a-half slowly eroding Union support, allegedly encouraged employees to spring a disaffection petition on the Union in 2019 and eject it entirely. But there are fundamental problems with the ALJ's view of events.

First and foremost, the facts showed that the Company *was open and transparent with the Union about the existence of the profit-sharing plan*. The Company's purported years-long deception of the Union about the existence of the profit-sharing plan simply never happened. As noted above, former Union Steward Prince testified that he was aware of the profit-sharing plan *since 2005*. Yet the existence of this alleged fact – the Union's supposed lack of knowledge of the Company's profit-sharing plan -- was the cornerstone upon which the ALJ built his entire decision and the foundation for nearly every other finding against the Company that the ALJ made. Once that cornerstone crumbles, as it must upon the Board's review of the record, the rest of the ALJ's Decision comes tumbling down.

The ALJ, in reaching his erroneous decision in totally disregard of Prince's testimony, among others, failed to "tak[e] into account contradictory evidence and evidence from which conflicting inferences could be drawn" and failed to explain why he rejected the substantial evidence that conflicted with his final decision. Most significantly, the ALJ wrongly found that a conversation between Drews and Evans on September 6, 2019, was the only material conversation relating to the Union's awareness of the pension contributions. Decision at p. 4 (finding "Drews brought Evans up to speed and, at long last, revealed that Coreslab had been covertly offering profit sharing to Unit members that were non-members for several years"). But, in making this crucial and erroneous finding, the ALJ simply dismissed – without any explanation – the testimony *of the Union's very own former Steward,* Union Steward Prince, that in fact, he had been aware of the Company's practices for the past fourteen years.

Even if Union Steward's notice of the profit-sharing plan could not be attributed to the Union (and his knowledge *should* be attributed to the Union since he was the Union's agent, as set forth below), the record shows the Company could have reasonably assumed the Union was fully aware of the profit-sharing plan from the outset in 2005 since the Union Stewards knew about it. There was simply nothing secretive or covert about the Company's conduct.

Once the ALJ's unfounded assumption that the Company was engaging in years-long secret conduct to deceive the Union is rejected, as it must be on this record, the ALJ's other findings that flow from that initial finding also fail. In particular, the record refutes that ALJ's findings (1) that the Company made unilateral changes that lacked a "sound arguable basis" *since the Union knew of these changes for nearly a decade*, (2) that the statute of limitations did not begin to run until September 6, 2019, *even though then-Union Steward Prince had notice of the profit-sharing plan and how it worked since 2005,* (3) that the Company failed to share relevant

information with the Union, (4) that the Company failed to bargain in good faith, (5) that the Company wrongly withdrew recognition and (6) that the Company discriminated against Union-members and, in particular, exhibit animus. The Board should therefore reject the ALJ's decision and, based on its own review of the record and, in particular, based on the testimony of the Prince, dismiss the Charges.

In the alternative, should the Board not rule in favor of the Company, the Board should, at a minimum, remand this case ordering the ALJ to make his credibility determinations based on the record as a whole, including taking into account conflicting testimony requiring credibility determinations, and in accord with the standards of *Universal Camera* and its progeny. *See In Re Stevens Creek Chrysler Jeep Dodge, Inc.*, 353 NLRB 1294, 1296 (2009) (the failure to address an allegation, make an express credibility finding regarding certain testimony, or address contrary testimony warranted a remand to the ALJ to make the necessary credibility resolutions and determine whether an 8(a)(1) violation was established); *Saigon Gourmet Rest., Inc.*, 353 NLRB 1063, 1064 (2009) ("Because the judge made no credibility findings resolving the testimonial conflict, we will remand this allegation to the judge."); *PPG*, 353 NLRB at 224; *Fortuna Enters.*, 354 NLRB at 203; *see also Edgewood Nursing Ctr. v. NLRB*, 581 F.2d 363, 365 (3d Cir. 1978); *Sears*, 349 F.3d at 514 (*citing Scivally v. Sullivan*, 966 F.2d 1070, 1076 (7th Cir. 1992) ("ALJ must minimally articulate his reasons for crediting or rejecting" evidence)).

III. EXCEPTIONS APPLICABLE TO THE ALJ'S FINDINGS, RULINGS, AND CONCLUSIONS REGARDING THE VARIOUS ALLEGED UNFAIR LABOR PRACTICES (EXCEPTIONS 4 to 27)

A. *The Relevant Law*

1. Administrative Law Principles

It is black letter administrative law that the record in any unfair labor practice proceeding must factually support an ALJ's decision, including the ALJ's "findings of fact, conclusions of

law, and the reasons or grounds for the findings and conclusions, and recommendations for the proper disposition of the case." 29 C.F.R. § 102.45(a). The Board reviews *de novo* the record, including the evidence entered at the hearing, the ALJ's Decision, the exceptions thereto, and supporting briefs when addressing exceptions raised by a party to an ALJ's Decision and recommended order - and then to decide the matter. 29 C.F.R. § 102.48(b). The ALJ's overall Decision fails under these standards and must be reversed.

B. ***Were the charges relating to the Company's profit-sharing plan and pension contributions practices, which had been in place since 2005, barred by Section 10(b)'s six-month statute of limitations? (Complaint, ¶ 6(a)-(c)) (Exceptions 4 to 27).***

At the outset, the ALJ erred in his findings, regarding the following foundational facts:

- Floyd Prince was an agent of the Union, elected by bargaining unit employees to act as a steward for 12-14 years, until May 2017. Tr. 520-21.
- The Union had constructive notice of the pension plan and Coreslab's profit sharing program.
- Coreslab had a "sound arguable basis" for its method of distribution regarding benefits for bargaining unit employees.
- *Floyd Prince was an agent of the Union, elected by bargaining unit employees to act as a steward for 12-14 years, until 2017. Tr. 520-21.*

As the party asserting the 10(b) affirmative defense, Coreslab acknowledges it has the burden of demonstrating the Union had knowledge of the Coreslab's profit sharing program and its distribution method. *Chinese American Planning Council, Inc*., 307 NLRB 410 (1992). The evidence clearly shows that Prince was an agent of the Union when he possessed authority in the interest of the Union to use independent judgment in exercising or effectively recommending bargaining as required by National Labor Relations Board precedent. *Tyson Fresh Meats, Inc*. is the leading case to analyze whether a steward is an agent of the union. 343 NLRB 1335 (2004).

There, the Board explains that a steward can be an agent of a union by holding actual or apparent authority:

> [A]ctual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. Apparent authority, on the other hand, results from a manifestation by a principal to a third party that another is his agent. Under this concept, an individual will be held responsible for actions of his agent when he knows or "should know" that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him.

Id. at 1336 (citing Restatement 2d, Agency, § 27; *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446 fn. 4 (1991)). Regarding apparent authority, the Board has clarified that it "results from a manifestation by a principal to a third party that another is his agent. 'Under this concept, an individual will be held responsible for actions of his agent when he knows or 'should know' that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him.'" *Long Drug Stores of California, Inc.*, 347 NLRB 500, n.2 (2006). Of course, "[f]or responsibility to attach under either theory of agency, it is not necessary that the principal expressly authorize, actually desire, or even know of the action in question." *Wal-Mart Stores, Inc.*, 350 NLRB 879, 884 (2007).

Instructive to the facts of the present case, a Division of Judges case previously stated: "the Board has placed probative value on an alleged agent's position as steward, finding that a steward is the first union representative the members look to, and the man from whom they take their cues insofar as union policy is concerned." *Titus, LLC*, No. 5-CA-35081, 2010 WL 3982228 (Aug. 26, 2010). The judge reasoned that the steward in *Titus* case had actual authority for the union even though there was "no affirmative evidence that the Union specifically authorized the stewards to participate in the election campaign." *Id*.

Here, Coreslab established that Prince was a union agent, and it further established that Prince had both actual and apparent authority. Whether a shop steward's knowledge will be imputed to a union for purposes of determining whether the 10(b) period commences depends on the factual context. *See, e.g., City & Suburban Delivery System,* 332 NLRB 870, 876 (2000) (Board relies on authority such as the CBA and the Union's constitution and bylaws to determine agency). The Board has affirmed that stewards act as a union's agent for 10(b) purposes where they:

> have regular responsibility for ensuring an employer's compliance with the collective-bargaining agreement, for maintaining the Union's records of employees on a jobsite, for informing those employees about their dues obligations (and occasionally receiving dues from them), and for insisting that all employees have current workcards as a condition to working on the jobsite.

A&M Wall-Board, 318 NLRB 196, 196 at n.3 (1995); *see also Courier-Journal,* 342 NLRB 1093 (2004) (steward was union agent for 10(b) purposes where he had been a bargaining committee member for at least 1 year and attended all bargaining sessions); *Baytown Sun*, 255 NLRB 154, 160 (1981) (steward's knowledge imputed to union for purposes of 10(b) where she was closely tied to union, was a member of the union's negotiating committee, and had attended all negotiating sessions); *In re International Broth. Of Teamsters, Local 705 (K-Mart),* No. 33-CB-3889, 2003 WL 22006408 (Aug. 20, 2003) ("In numerous cases, union stewards have been found to possess apparent authority and therefore to have been agents of their union. … An important consideration in finding such apparent authority is a steward's responsibility on behalf of the union for enforcing the terms of a collective-bargaining agreement on the job, including the authority to attempt to resolve grievances and disputes"). Those factors are present here in relation to Prince – the

unrebutted testimony confirms he was a member of the union's bargaining committee and attended all bargaining sessions while he was a steward between 2011 and May 1, 2017. Tr. 563.[4]

Notably, neither the GC nor the ALJ's Decision considered, analyzed, or distinguished these facts. Instead, the ALJ wrongly focused on factually distinct cases. In particular, ALJ Ringler focused on a case where the steward "had no role in matters relating to bargaining, and the Respondent had no reason to believe otherwise." *See Brimar Corp.*, 334 NLRB 1035, 1037 at n.1 and at 1039 (2001) (union steward "was an ordinary production worker with no role in matters relating to bargaining subjects").

During the hearing, and in its post-hearing brief, the GC argued:

> Prince, on the other hand, only communicated with Union leadership as it concerned presenting new employees with a packet of materials upon their initial hire. This is not surprising, per Evans' testimony, because in the eight to nine years Evans and Neil Drews held their respective leadership duties, it was Evans whom Drews reached out to in order to address issues with the bargaining unit. No one else. T. 128. Those discussions were not had at the steward level. T. 128. The record does not contain evidence of significant Union activity by Prince as steward that extends beyond handling minor bickering issues between employees, the distribution of Union literature, and his literal physical presence at negotiations.

GC Brief at 36. Respondent's pending Motion to Reopen the Record directly illustrates this is simply false. Prince had the actual and apparent authority to impact terms and conditions of bargaining unit employees, including negotiating with Coreslab regarding holidays for bargaining unit employees. On the record, Union steward Prince, who for many years was the Union's primary on-site representative, was an agent of the Union. Indeed, contrary to the ALJ's insinuation in his

[4] In an attempt to evade the conclusion that the Union Stewards' knowledge of the Company's practices constituted notice to the Union of them, Evans testified that the Union's stewards at Respondent's facility are not "trained on the intricacies to know whether or not there has been a violation of federal labor law." Tr. 127. There is no evidence that Prince or the other stewards were incapable of recognizing a violation of the parties' CBA or federal labor law. Moreover, in any event, it would be unreasonable to allow a union to gain an essentially infinite statute of limitations simply by failing to train its representatives regarding their work on behalf of the union and its members.

Decision that Prince was only authorized to settle low-level grievances (Decision, fn.20), the unrebutted hearing testimony confirms:

1. Prince was involved in collective bargaining sessions, where he represented the interests of Coreslab bargaining unit employees, and he was the Company's primary point of contact. Tr. 561-63.

2. Prince also signed on behalf of employees to select the specific holiday they would receive on July 5, 2012, July 5, 2013, December 26, 2014.[5]

3. Article 7.1 of the now-expired collective bargaining agreement between the parties allowed the Union to access the facility. Both Prince and Evans relied on this Article to meet with bargaining unit employees, and Prince specifically educated new hires that one of the benefits of joining the Union was they would have access to the Union-sponsored pension plan. Tr. 559.

4. Coreslab's management made statements about its profit sharing program to all bargaining unit employees.

5. Union stewards, including Prince attended these meetings and despite their knowledge of the plan, never objected to this distribution of benefits. Tr. 532-33.

The ALJ's Decision further fails to apply the correct standards for determining whether Union Steward Prince, who admittedly had knowledge of the Company's profit-sharing plan and how it worked, was an agent of the Union and thus his knowledge constituted knowledge of and notice to the Union. In footnote 12, the ALJ states without citing to the record: "Stewards are voluntary, working Unit members, who do not possess any specialized training in labor law. They only file and present grievances." p. 5, fn. 12. The ALJ further bets on this conclusion by explaining that Union steward Prince did not file any grievances, and did not report these issues to Union management. In footnote 20, the ALJ has some cursory discussion around these issues but falls short of addressing the question of apparent authority under traditional agency principle

[5] Respondent is also filing a Motion to Reopen the Record, including documents that further illustrate these facts. Coreslab understands that if this Motion is not granted, it will disregard this specific evidence not already in the record.

analysis. When accounting for these unrebutted facts, the ALJ's Decision must be reversed on this cornerstone issue.

1. Coreslab met its burden that the Union had notice of how Coreslab bargaining unit employees were eligible for pension or profit sharing benefits, and the GC failed to rebut that evidence.

In this case, the Union had notice of profit sharing benefits through Steward Prince. Prince testified he presented new hires with the differences between benefits offered between being a dues-paying member and non-dues paying bargaining unit position. Tr. 537. This practice was in place from 2005 through the expiration of the collective bargaining agreement between the parties on September 30, 2019. This established practice therefore goes far beyond the six month statute of limitations established by Section 10(b) of the Act.[6]

Nevertheless, even assuming Prince was not an agent of the Union – a finding that would be contrary to the law and the facts of this case – the Union's allegations are still fatally flawed because the Union failed to exercise "reasonable diligence," which would have discovered the alleged unfair labor practice. *See, e.g., Concourse Nursing Home,* 328 NLRB 692, 693–94 (1999); *R. G. Burns Electric*, 326 NLRB 440, 441 (1998). "Obviously, a union cannot be charged with failure to exercise 'reasonable diligence' in the discovery of a fact which it lacked the 'means to discover' in the first place. By parity of reasoning, however, **if the union possessed the means to**

[6] Respondent is also filing a Motion to Reopen the Record and Administrative Notice in the Alternative, including an arbitration decision by an arbitrator mutually selected by the parties who decided it was incredulous that the Union had no notice. Coreslab offers this decision to place the Board on notice and out of an obligation to be candid to the tribunal. Coreslab understands this decision is not binding and if this Motion is not granted, it will disregard this specific evidence not already in the record. Importantly, the arbitrator there found:

> On this record, the grievance is untimely to the extent it seeks a remedy or relief for any conduct before the day it was filed, September 12. Even assuming (1) a steward may not be expected to know the issues raised here and (2) current Union leadership did not have actual knowledge of profit sharing until Spring 2019, the Union should have known the practice long before its grievance. Management's public statements at yearly safety meetings, bargaining for prior contracts, decreases in Union membership and Article 7.1 access to visit the Plant, ***create a presumption of Union knowledge that precludes any pre-grievance remedies.***

discover the action at some significantly earlier point, then its failure to take advantage of that means may be a critical consideration in a judgment that the union failed to exercise 'reasonable diligence.'" *In re Miramar Hotel Corp*., 336 NLRB No. 123, at **47 (2001) (Board adopting recommended order of the ALJ with some modification) (emphasis added). Here, it is unreasonable for the Union to remain ignorant about the pension distribution and profit sharing plan. Contrary to the ALJ's unsupported assertion in his Decision, Coreslab did not hide the profit sharing program. Union steward Prince's unrebutted testimony is that he actually educated new hires on this very issue.

The Board's decision in *The Arrow Line, Inc.*, 340 NLRB 1 (2003), is instructive to our facts. Note that this was also a benefits payment case dealing with vacation benefits. In *The Arrow Line, Inc.*, "there [was] no dispute that the Respondent never paid mechanics and cleaners" the vacation time that the Union later claimed was owed to bargaining unit employees. There, the ALJ found that the Union would have had knowledge through reasonable diligence because – similar to our facts - the local president was a member of the bargaining unit and was "a participant in the negotiations which resulted in the contract provision at issue . . . ." *The Arrow Line, Inc*., No. 34-CA-9388, 2001 WL 1598693 (June 14, 2001). Importantly, after the General Counsel filed exceptions to the Administrative Law Judge's decision, the Board dismissed the complaint. *In re Arrow Line, Inc.*, 340 NLRB 1 (2003).

In yet another Board case, it determined: "While a union is not required to aggressively police its contracts aggressively in order to meet the reasonable diligence standard, it cannot with impunity ignore an employer or a unit, as the union in this case did, and then rely on its ignorance of events occurring at the shop to argue that it was not on notice of an employer's unilateral

changes." *Moeller Bros. Body Shop, Inc.*, 306 NLRB No. 29 (1992). In *Moeller Bros.*, the Board contemplated facts analogous to ours:

> We further agree with the judge that **the Union, in the exercise of reasonable diligence, should have become aware of the Respondent's failure to make fringe benefit fund payments on behalf of journeymen and utility employees and of the failure to pay the utility employees contractually required wages**. Throughout the period in issue, the Respondent reported at most four journeymen to the Union but had at least twice that number of employees working in its shop. As noted with regard to the prejourneymen, it is evident that the Union could have readily discovered the discrepancy had it visited the Respondent's shop during operating hours. In fact, when Union Official Tolentino did so, he immediately noted more than the reported number of employees working, requested the Respondent to furnish it with the names of all its employees, and filed the charges giving rise to this proceeding. In addition, the Union has failed since 1977—some 12 years prior to the charge in this case—to monitor or enforce in any manner its contractual union-security rights. **Had the Union made any effort to enforce the union-security provisions, it would have become aware that the Respondent was hiring employees without providing fringe benefits and without paying contract wages**. *Farmingdale Iron Works*, supra.

306 NLRB 191, at **3 (1992) (footnotes omitted; emphasis added). The Board further explained reasonable diligence standard – critical and applicable to our facts:

> We conclude that the Union is chargeable with constructive knowledge by its failure to exercise reasonable diligence by which it would have much earlier learned of the Respondent's contractual noncompliance. While a union is not required to aggressively police its contracts aggressively in order to meet the reasonable diligence standard, it cannot with impugnity ignore an employer or a unit, as the Union in this case did, and then rely on its ignorance of events occurring at the shop to argue that it was not on notice of an employer's unilateral changes. This is not a case where information regarding misconduct is only in the hands of the employer, where an employer has concealed its misconduct, or where the size of an employer's operation prevents ready discovery of the misconduct. Rather, this is a case where the Union, if it had exercised reasonable diligence, would clearly have been alerted much earlier to the misconduct. Accordingly, we adopt the judge's decision.

Id.; see also Matthews-Carlsen Body Works, Inc., 325 NLRB 661, at 662 (1998) (adopting the ALJ decision: "The [employer] did not conceal the number of employees that it employed. That

should have been evident to [union representative] on his visits. The size of the operation should have clearly indicated to [union representative] that there were more than five employees. In fact there were 12"). With respect to Coreslab, Prince had knowledge of how the Company distributed profit sharing. Assuming Prince was not an agent of the Union, the Union itself failed to exercise reasonable diligence in relation to how Coreslab's bargaining unit employees received benefits. Indeed, the Union should have known about Coreslab's profit sharing plan which had been in place for at least 14 years. Finally, there should be no grounds to toll the 10(b) statute of limitations because Coreslab was open about the profit sharing plan and pension contribution practices. Similarly, there is zero evidence in the record to show that Coreslab attempted to conceal this from the Union. Again, Prince and other stewards were present during discussions around Coreslab's profit sharing program. Tr. 553. It therefore follows that the GC failed to overcome this information and the ALJ's Decision must be reversed.

Importantly, with respect to the reasonable basis defense: "[u]nder that standard, the Board will not find a violation of the Act if, in making the change, the employer relied in good faith on a sound and arguable interpretation of the contract." *Walt Disney World Co*., 359 NLRB 648, 653 (2013) (citing *Bath Iron Works Corp*., 345 NLRB 499, 502 (2005)).

2. Coreslab had a "sound arguable basis" for its method of distribution regarding benefits for bargaining unit employees.

As an initial point, the NLRB's jurisdiction regarding contract interpretation has its limits. *See Iron Workers, Local 708*, 169 NLRB 1062 (1968). Congress determined that the Board "should not have general jurisdiction over all alleged violations of collective bargaining agreements." (quoting S. Rep. 1126, 80th Cong., 1st Sess. (1947). In addition, the Board has previously announced: "Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many

years, with the approval of the courts: "[the Board] will not effectuate statutory policy . . . for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act." *United Tele. Co. of the W. & United Util., Inc.*, 112 NLRB 779 (1955).

Assuming that the Board has jurisdiction to interpret the now-expired collective bargaining agreement between Coreslab and the Union, Coreslab had an established past practice regarding how to allocate Union-sponsored pension benefits and its profit sharing plan. As recently as 2019, the Board reiterated:

> "It is well settled Board law that in interpreting a collective bargaining agreement to evaluate the basis of an employer's contractual defense, the Board gives ***controlling weight*** to the parties' ***actual intent*** underlying the contractual language in question and examines both the contract language itself ***and relevant extrinsic evidence, such as past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself***.

Pacific Maritime Ass'n, 367 NLRB No. 121, at 5 (2019) (emphasis added). Here, the ALJ failed to analyze or even consider past practice. While on footnote 17 of his Decision, he acknowledges that "past practice" was relevant to determine whether the employer had a "sound arguable basis," he reached the opposite conclusion. The ALJ's Decision, however, lacks any analysis that past practice here clearly favors Coreslab. Contrary to the ALJ's Decision, the uncontroverted record testimony establishes that Coreslab communicated its profit sharing disbursement annually.

In the seminal case on the "sound arguable basis" standard, the Board reasoned it is not enough for the GC to show that their interpretation of the CBA is reasonable when the respondent/employer's interpretation is *also* reasonable. *Bath Iron Works Corp.*, 345 NLRB No. 499, at 502 (2005) ("The General Counsel's interpretation … is reasonable, but no more so than

the Respondent's. Because the General Counsel bears the burden of proof to show that the CBAs have been modified, he cannot prevail if all that is shown is that, as here, his interpretation of the contract is reasonable.").

The parties' actual intent as reflected by the underlying contractual language is paramount. *Mining Specialists*, 314 NLRB 268, 269 (1994), and is determined by reviewing the plain language of the agreement. *Id*. The Board will also consider extrinsic evidence, such as past practice and bargaining history relating to the provision itself. *Id*. The Board does not interpret collective-bargaining agreements in a vacuum or rely on "abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying th[at] context," *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 430 (1967). Rather, the Board interprets contracts in light of the "realities of labor relations and considerations of federal labor policy. . . ." *Electrical Workers Local 1395 v. NLRB*, 797 F.2d 1027, 1033 (D.C. Cir 1986)."

Here, the critical question is whether Coreslab had a sound reasonable basis to believe that pension contributions were only required for dues-paying union members. Because Respondent's operations are located in Tulsa, Oklahoma - a right-to-work state – Coreslab only remits dues for those members who have submitted written authorization for them to withdraw those dues. Coreslab was under the impression that this same rule applied to pension contributions. This interpretation is bolstered by the practice continuing from 2011 forward despite having bargained with the Union regarding the entire collective bargaining agreement in 2015. But even if Coreslab's interpretation of Oklahoma's right-to-work was inaccurate, such evidence is insufficient to establish their interpretation intended to violate the Act. *See Richfield Oil Corp. v. NLRB*, 143 F.2d 860 (1944) (violation was a mistake of law and no evidence of general attitude or conduct on employer's part to violate the Act).

C. *Did the GC establish by a preponderance of the evidence that unremedied ULPs prompted the disaffection petition. (Exceptions 4-27)*

It is well-established that an employer may withdraw recognition of a union where it has objective evidence of the union's loss of majority status. *E.g. Johnson Controls, Inc. ("JCI")*, 368 No. 20 (2019). Indeed, it is illegal for an employer to bargain with a minority union. *ILGWU v. NLRB*, 366 U.S. 731 (1961). As the Board established in *JCI*, employers may rely on the objective showing of lack of majority status at the time it is received. Where the union claims that the petition does not adequately represent the sentiments of the bargaining unit, the union's remedy is to petition, within 45 days of the withdrawal of recognition, for a representation election. *See Johnson Controls, Inc.*, 368 No. 20, sl. op. at 2, 8.

On September 11, 2019 – prior to the Union filing any unfair labor practice charge - Coreslab received objective proof of the Union's loss of majority status when 18 out of 26 bargaining unit members expressed their right to choose or not choose a bargaining representative, and lawfully withdrew recognition. *See Lexus of Concord*, 343 NLRB 851, at 851-52 (2004); *Johnson Controls, Inc.*, 368 No. 20, sl. op at 2. *Johnson Controls* makes clear that Coreslab is permitted, if not required, to accept and act upon the employee sentiment requiring withdrawal of recognition or risk violating Section 8(a)(2) of the Act. *Johnson Controls, Inc.*, 368 No. 20, sl. op. at 8-9. Any challenge from the Union to this lawful withdrawal should have either sought a representation election to allow employees to exercise their right to choose whether to be represented by a union or should have been dismissed without further proceedings.

The ALJ erroneously failed to consider *JCI*. And, in any event, there was no evidence in the record that the unfair labor practice charges had a causal relationship with the disaffection petition. To determine whether a loss of support was caused by an employer's alleged unfair labor practices, the Board considers:

> (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

Master Slack Corp., 271 NLRB 78 (1984); see also *In Re Miller Waste Mills, Inc.*, 334 NLRB 466, 468 (2001), enfd. 315 F.3d 951 (8th Cir. 2003). This is an objective standard. *Saint Gobain Abrasives, Inc.*, 342 NLRB 434, 434 fn. 2 (2004).

Here, on the first *Master Slack* factor, it is significant with respect to the pension payments and the profit-sharing plan that Coreslab had engaged in both practices for fourteen years before the withdrawal petition, with the knowledge and acceptance of the Union's Steward, its agent, and in full view of the Steward and the bargaining unit.

The undisputed record evidence is that Coreslab began making pension contributions for only the employees listed on the Union-sponsored Central Pension Fund ("CFP") Remittance Forms, which employees were participants in the pension fund and Union members in 2005, and did so continuously through the expiration of the CBA in 2019. Steward Prince was fully aware that this was how the pension plan was initiated in 2005 in conjunction with the first CBA between the Union and Coreslab. Drews testified when he became General Manager in 2011, Coreslab was making pension contributions for the individuals listed in Remittance Forms from the CPF, and that Coreslab continued this practice during the entire time he has been General Manager. There is no evidence that this method of pension contributions was unilaterally implemented by Coreslab during bargaining for the 2019 CBA, or close in time to the disaffection petition.

The same is true for profit-sharing participation. Again, Prince testified that in 2006, the plant manager at the time, Morris, approached him to inform him that Coreslab wanted to make the profit-sharing plan available to unit members who were not participating in the CPF. Tr. 558.

Prince thought that was fair, and did not contend that this violated the CBA. Tr. 527. Rather, Prince informed the employees in the bargaining unit of this new benefit. Tr. 537. Drews continued this practice when he became General Manager in 2011, and met with employees three times each year to discuss the profit-sharing plan and distributed profit-sharing checks to employees at one of these meetings each March. Tr. 552-53. There is no evidence that the company's administration of profit-sharing benefits for employees who did not participate in the pension plan was implemented during negotiations in 2019 or in close proximity in time to the disaffection petition.

With respect to the 2019 negotiations, these negotiations began in April 2019 – five months before the Petition was delivered to Drews. The parties were making progress in negotiations, as evidenced by Coreslab's proposals in the third session and the testimony of both Drews and Evans about the third session. Tr. 192 (Evans: "a good place to start"); 696 (Drews: "it was a proposal that we could go forward"). Coreslab modified a number of its proposals in the third session, and added a wage increase. At the end of the third session, the parties agreed to meet again to continue negotiations. It was five days after this third session that the Petition was delivered to Drews.

On the second factor, there is no evidence that the contract negotiations, including the two extensions, would have any lasting effect on employees. Nor is there any evidence in the record that the way the company paid pension contributions and administered the profit-sharing plan had any detrimental or lasting effect on employees. Long-time Union steward Prince was in favor of both the pension plan being available to union members and the profit-sharing plan being available to unit members who chose not to join the pension plan. Prince testified: "We didn't have a problem with it;" and Coreslab was "just trying to make it equal" because "if you are a Union member, you are getting a pension." Tr. 528, 529-530. Unit employees could join the pension plan whether or not they joined the Union, and Prince made his pitch to every new hire to join the Union

and the CPF. Coreslab did not prevent any unit employee from participating in the CPF. Moreover, Coreslab did not make some sudden change in the way it administered the profit-sharing plan or made pension contributions in 2019. Both were long-standing practices.

On the third factor, there was no evidence that the pension contributions, profit-sharing plan, or contract negotiations tended to cause employees to be disaffected with the Union, certainly not in the time frame of September 2019 when the Petition was delivered to Drews. Coreslab had not changed how it paid pension contributions or for which employees made pension contributions. Nor had Coreslab changed the profit-sharing payment made in early March 2019 for employees' work in 2018. The only new event in 2019 was the CPF audit, and the CPF's assertion that Coreslab was not making the pension contributions correctly.

On the fourth factor, there was no evidence presented as to what effect the pension contributions, profit-sharing participation, or contract negotiations had on employee morale, organizational activities, or membership in the union. Neither the GC nor the Union called any members of the bargaining unit to testify on this issue. It was undisputed that no employee filed a grievance, or even spoke with the Union or a Union steward about filing a grievance, over pension contributions or profit-sharing. Long-time Union steward Prince informed employees of what Coreslab was doing with profit-sharing in 2006, and was part of the meetings Drews held with employees about profit-sharing each year. From March 2011 to March 2019, when Drews distributed profit-sharing checks year, there were no grievances over the fact that some unit members participated in the profit-sharing plan and others in the pension plan. Only in September 2019, did the Union file a grievance over profit-sharing in the midst of bargaining. But there was no evidence introduced that any bargaining unit member requested that this grievance be filed. In short, none of the *Master Slack* factors are met here.

Regarding the underlying facts in *Master Slack*, it is notable that the employer there committed several "flagrant" violations unrelated to the decertification petition. The Board applied the previously-cited four-factor test to decide whether these unrelated violations affected the employees' decision. Relying primarily on the timing at issue—the employer's alleged violations occurred nearly a decade earlier—the Board found no connection to the decertification petition and **allowed the employer to withdraw recognition**.

This proposition is underscored in a recent decision, where the Board held that an employer could rely on a decertification petition to withdraw recognition from a union, even though the employer committed an unfair labor practice:

> Not every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996) (footnote omitted). The record does not contain specific proof of a causal relationship between Downs-Haynes' promotion and the loss of support among employees for the Union.

Aim Aerospace Sumner, Inc. & Int'l Ass'n of Machinists, Dist. 751 Int'l Ass'n of Machinists, Dist. 751, 367 NLRB No. 148 (2019). Those same principles must apply here. Coreslab's alleged change to pension contributions happened in 2005 – fourteen years before the Union filed the unfair labor practices that apply to this case. Union steward Prince was aware of this and counseled new hires for years regarding this.

Moreover, there is no evidence here that Coreslab aided or otherwise was involved in the disaffection petition. It is telling that the petition was submitted by employees who wanted to exercise their protected right to decide whether to be represented by a union was submitted, unsolicited to Coreslab management before the Union filed any unfair labor practice charge. Coreslab's employees voiced their opinion, and failure to honor that would result in a violation of

8(a)(2) of the Act. In the alternative, *JCI* provides the appropriate remedy – and the Union failed to avail themselves of the same. It follows that the Board must dismiss this allegation or remand for an election as instructed by *JCI*.

D. *Coreslab Bargained in Good Faith.*

In the GC's Complaint, the conduct identified as allegedly showing bad faith bargaining by Coreslab were: refusing to meet and confer with the Union; delaying meeting with the Union; revoking tentative agreements; and refusing to bargain further after the third session on September 6, 2019. The evidence, however, does not support these arguments. "Both the employer and the union have a duty to negotiate with a 'sincere purpose to find a basis of agreement,' but 'the Board cannot force an employer to make a "concession" on any specific issue or to adopt any particular position." *Atlanta Hilton*, 271 NLRB No. 214, at 5, 271 NLRB 1600, 1984 WL 36775 (1984). The Board further explained the inquiry under Section 8(a)(5) in *Atlanta Hilton* as follows:

> It is necessary to scrutinize an employer's overall conduct to determine whether it has bargained in good faith. "From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree.

Atlanta Hilton, 271 NLRB No. 214, at 5, citing *NLRB v. Advanced Business Forms Corp*., 474 F.2d 457, 467 (2nd Cir. 1973). Even if the Board believes that "some of the terms are harsh" in Leader's proposals, "that does not give the Board or the courts the power to strike them." *NLRB v. Tomco Comm.*, 567 F.2d 871, 882 (Ninth Cir. 1978). The Board held that it would "not attempt to evaluate the reasonableness of a party's bargaining proposals, as distinguished from bargaining tactics, in determining whether the party has bargained in good faith." *Reichhold Chemicals, Inc*., 277 NLRB No. 73, 277 NLRB 639, 640 (1985).

Review of an allegation of bad faith bargaining requires that the "totality of circumstances" be examined. *United Steel, Paper & Forestry Local 19-G (PPG Industries)*, 356 NLRB No. 127, at 2, 356 NLRB 996 (2011); *see also Mead Corp. v. NLRB*, 687 F.2d 1013, 122 (11th Cir. 1983). Single occurrences in negotiations that occurred over a four month period cannot be presented in isolation to try to prove a lack of good faith. That is exactly what the GC attempted to do here, and the ALJ incorrectly adopted this theory.

Parties are tasked in bargaining with making a sincere effort to reach an agreement. "In ruling on an allegation that a party has failed to bargain in good faith, it is well established that we look to the totality of circumstances reflecting the party's bargaining frame of mind." *Merrell M. Williams*, 279 NLRB No. 13, 1986 WL 54206, **3 (1986).

There can be no doubt that Drews was making a sincere effort to find common ground on the subjects in bargaining so that the parties could reach a successor agreement, as Drews credibly testified at 735:

> Every time I came to the table, I tried to progress when I was offering different options, that if the audit – once we received the audit, and I was willing to – if Mike and Justin were willing to remove the pension and move forward with profit-sharing, where Union members were still – Union members were still eligible, that would include everybody, and that would include the whole bargaining unit. Therefore, everybody would have been eligible, and I saw that as a positive side.

Drews improved Coreslab's contract proposals in each bargaining session. In the third session, Drews modified the company's position on several articles, made no changes in a large number of articles, and included both a wage increase and new job classifications that would have meant increased wage growth for unit positions. JX-19. In contrast, the Union did not provide Drews with any written proposals, and refused to modify its proposals for unprecedentedly large wage and pension increases. The Union never changed its position on a $6.00 raise over a four-year agreement and a $2.00 increase in pension contributions over four years. Evans testified,

"[M]y wage package stayed the same from our very first meeting, from our very first proposal." Tr. 96.

There is no record evidence that Coreslab refused to meet and confer with the Union. Drews agreed to three meetings, and showed up and bargained at each meeting. Contrary to the ALJ's erroneous finding, Drews did not cancel bargaining sessions. There was a slower pace to negotiations in 2019, which Drews acknowledged. But this was caused solely by the audit by the CPF which began only a week after the first bargaining session. Initially, the CPF audit did not concern Drews, but after comments by the auditor on the first day of the audit, Drews thought the CPF might claim as much as $100,000 in underpaid pension contributions.

"The cost of a pinpointed economic demand by the union is a pertinent factor in the appraisal of an employer's hard or amenable reaction." *The Kroger* Co., 164 NLRB 362, 366 (1967). Drews was concerned with the cost of the Union's proposals on wages and pension contributions, which were "astronomical" in comparison to the prior contract negotiations in 2015. Tr. 607-08. Drews also was concerned with the cost of pension contributions both in terms of the audit and an on-going basis under the provisions of the audit. Tr. 639-40. After Drews had an idea what the outcome of the audit might be, Drews called Evans to request that the parties wait to meet until the CPF provided the audit results. Evans agreed to an extension of the CBA of three months as the parties thought it would take 60 days for the CPF's audit report. Reaching an extension illustrates there was no nefarious intent from Drews.

The parties then met on July 26 in the second bargaining session, which was only nine days after Drews received the CPF audit letter. The CPF asserted Coreslab owed $119,000 – more than Drews anticipated. Still, at the July 26 session, Drews made a proposal to improve wages for employees in several job classifications by adding new classifications to App. JX-15.

At the end of the second session, the Union brought up the issue of a second extension of the CBA. The Union tried to leverage Drews' concern over the audit results into an unusual temporary raise for employees with the extension. Coreslab did not agree to a temporary wage increase in connection with the extension as the Union was not willing to agree to any of Coreslab's proposals in the extension. The parties then agreed on a second extension of the CBA to September 30, 2019. Evans testified that the second extension was for two months "to give them time to the answers back from the CPF." Tr. 74. Both extension agreements were mutually negotiated, drafted on the Union's letterhead by Evans, and signed by Drews and Evans.

Between the second and third sessions, Drews was the one who found a way to move the needle for Coreslab on the pension audit. Drews researched the CPF's website and found information indicating that Coreslab would not have withdrawal liability from the CPF. The issues of withdrawal liability were important to Coreslab in determining how to address the audit results, including the CPF's position that contributions had to be made by Coreslab for all unit employees. Coreslab already had proposed to the Union in the second session that the section on pension contributions, § 16.3, be deleted. If Coreslab could negotiate that provision with the Union, Coreslab still had to address the issue of withdrawal liability with the CPF. When Drews found that withdrawal liability was unlikely, he contacted his corporate office and got the go ahead to proceed with negotiations. Drews then emailed Evans to suggest a date for the third session.

Even at the end of the third bargaining session, Drews expressed optimism that the parties were making progress., especially with the company's proposal at that session: "To me it was a proposal that we could go forward, where they could take it to the bargaining members, and – or the Union members, that make – that vote on this, that they could take it right to them and maybe they could get an agreement." Tr. 695.

What Evans and Stark did not express to Drews was that they were never going to agree to Coreslab's proposal to delete the pension language. Evans did not think he and Stark ever told Drews that they would not agree to delete the pension language. Tr. 197. Evans testified that the Union's position was that it would not agree to delete the pension contributions: "Well, that is going to be the Union's stance, always." Tr. 197. Hence, Drews' efforts to negotiate the pension language out of the CBA was never going to succeed. Instead of simply telling Drews this, Evans and Stark allowed Drews to labor under the misapprehension that he could come up with something in lieu of pension contributions that would be satisfactory to Evans and Drews.

The parties left the third session agreeing to schedule more bargaining meetings. Only five days later Drews received the employees' disaffection petition. The fact that the parties had met on only three dates before the disaffection petition does not show bad faith by Coreslab. "Mere quantity or length of bargaining sessions does not establish or equate with good-faith bargaining; indeed, the reverse may sometimes be true." *King Radio Corp.*, 172 NRLB No. 109, at 18, 172 NLRB 1051, 1968 WL 19199 (1968); *Garden Ridge Mgmt., Inc.*, 347 NLRB No. 13, at 4, 347 NLRB 131, 2006 WL 1530147 (2016) ("the fact that a party does not meet with sufficient frequency does not necessarily mean that it does not wish to agree to a contract").

The other two items that the GC presented and ALJ adopted – Coreslab withdrawing from verbal tentative agreements and refusing to bargain after the September 6 session – were the result of the disaffection petition being delivered to Drews on September 11. As such, Coreslab's decision to withdraw from tentative agreements while assessing the disaffection petition was entirely appropriate. Withdrawal of bargaining proposals after receipt of a disaffection petition is not evidence of a failure to bargain in good faith. *Lexus of Concord, Inc.*, 343 NLRB No. 94, at 4, 343 NLRB 851, 2004 WL 2899840, (2004) ("Removing the contract offers from the table was

necessary to accomplish the Respondent's stated purpose of 'put[ting] everything on hold,' because if it had failed to do so the Union could have accepted the offers and thereby attempted to forestall any further inquiry into its continued majority status.").[7] Leaving the bargaining proposals on the table could have thwarted the employees' free choice had the Union accepted the proposals. The withdrawal of the proposals was the first step in the Company's response to the employees' disaffection petition.

The second step was notifying the Union that the Company would withdraw recognition of the Union when the CBA expired. This occurred after the Company had reviewed the potential for withdrawal liability to the CPF. Not meeting after September 6 was due to Coreslab's decision to respect the employees' decision in the disaffection petition. The disaffection petition demonstrated that employees no longer desired union representation, including not having a CBA.

Drews bargained in good faith on behalf of Coreslab during the 2019 contract negotiations. The evidence establishes this. There is no § 8(a)(5) violation.

1. Coreslab Did Not Discriminate Against Employees or Interfere with Employees' Rights in Coreslab's Profit-Sharing Program under (8(a)(1) and 8(a)(3))

The profit-sharing plan has a similar history at the Tulsa plant to pension contributions. Coreslab made the profit-sharing plan available to employees after it purchased the Tulsa plant in December 2004. The first profit-sharing payments were made in 2006, as employees had to have at least one year of service to participate in the profit-sharing plan.

Morris discussed the profit-sharing plan with Prince in 2005, including the Company's decision to make profit-sharing available to employees who did not participate in the pension plan.

[7] Also, withdrawal from a tentative agreement standing alone is not indicia of bad faith in bargaining. *Merrell M. Williams*, 279 NLRB No. 13, at 2. "We have previously declined to find employers who withdrew provisions on which tentative agreement had been reached during negotiations to have failed in their bargaining obligations when the employer's explanation for its retraction did not indicate a lack of good faith." *Id*.

Prince testified Morris talked to him and Merrill about profit sharing in 2005: "[H]e told me that the Union members got a pension fund, and to make it fair, the Coreslab was giving a profit-sharing so they could put their money into 401(k) or whatever." Tr. 527. Prince further testified: "*We didn't have a problem with it*." Tr. 528. Prince testified Coreslab was "just trying to make it equal" because "if you are a Union member, you are getting a pension." Tr. 528, 529-30. After Morris talked to him, Prince talked "to each and every one" of the Union members: "I told them what Jerry told me, that this is what the Union is providing and this is what the Company is going to provide." Tr. 530. Prince did not have any objection to Coreslab doing this, and did not file any grievance over it or raise it in contract negotiations in 2007, 2011, or 2015.

While the CBA is silent on profit-sharing, the parties may through their actions reaching a verbal agreement on profit-sharing as a benefit for employees who did not participate in the pension plan. The profit-sharing plan was implemented with the knowledge and agreement of Prince, the Union's steward. Prince testified the members of the Union "didn't have a problem with it." Tr. 528. The Union is bound by its agent's actions in accepting the company's decision on which employees participated in profit-sharing. A verbal agreement on a benefit is enforceable. *Noel Canning*, 2011 WL 4454810 (NLRB Div. of Judges, 2011)

Moreover, the Union did not grieve the Coreslab's implementation of the profit-sharing plan, and the Union did not raise the issue in negotiations in 2007, 2011, or 2015, which Prince participated in. "The Board has long recognized that principles of equitable estoppel will preclude a party a party from complaining of a unilateral change in a term or condition of employment where it has, by its conduct, led the other party to reasonably believe that it could deal unilaterally with the subject." *Manitowoc Ice, Inc*., 344 NLRB No. 145, at 3, 344 NLRB 1222, 2005 WL 1827772 (2005); *see also Speidel Corp*., 120 NLRB 733 (1958). In *Manitowoc Ice*, the Board

found that the Union had "acquiesced" in the employer's unilateral changes to the company profit-sharing plan that the employer had made without giving notice to the union to bargain. *Id*., at 4. The Board found there was a "'clear understanding' that the profit-sharing plan would remain a management prerogative, and that the Union by its conduct … 'bargained away' its interest in the plan." *Id*.

As with the pension contributions, the length of time that Coreslab has administered the profit-sharing in this way shows that profit-sharing has no connection to the disaffection petition. Profit-sharing was not implemented to discourage Union support. Prince's testimony shows this. It is disingenuous to suggest that an action taken by the company in 2006 with the agreement of the Union could have been intended to discourage union membership, or in fact discourage union membership, 13 years later in 2019.

The GC asserted, and the ALJ adopted the argument that Coreslab making the profit-sharing plan available to non-union members was discrimination under § 8(a)(3). However, an employer denying benefits it has granted to other employees may be found to violate § 8(a)(3) only "if there is sufficient evidence to show that the employer intended to penalize its represented employees because they selected a bargaining agent." *WOWK-TV*, 1990 WL 599024, *2 (NLRB G.C. 1990). The General Counsel failed to prove that any anti-union animus on Drews' part in the way Coreslab administered the profit-sharing plan. *Wild Oats Markets, Inc*., 2001 WL 1631379, at 13 (NLRB Div. of Judges, 2001), applying the Board's *Wright Line* test.

Here, there is no evidence that Coreslab offered profit-sharing to employees who did not participate in the CPF pension plan. There is no evidence that Coreslab did this to penalize union members who were participating in the pension plan. To the contrary, the unrebutted evidence at the hearing from Prince was that the company offered profit-sharing to provide an equal sort of

retirement benefit to employees in the bargaining unit who were not in the pension plan. This was a benefit to unit employees, and one that Prince agreed with. The evidence demonstrates that parties had a verbal agreement, reinforced by a past practice, on the profit-sharing plan. Coreslab did not violate §§ 8(a)(1) or (3) in the way it administered its profit-sharing plan.

2. Coreslab Did Not Stop Union From Speaking With Employees

Coreslab supervisor Danny Johnson did not prohibit Evans from speaking with employees, even the temporary employee with whom Evans was speaking when Johnson saw Evans in the break room. Tr. 572. Section 8(a)(1) of the Act makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. "The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities." *Farm Fresh Co.*, 361 NLRB No. 83, at 18-19, 361 NLRB 848, 2014 WL 5500709 (2014).

Here, Johnson saw Evans talking to a temporary employee who was employed by a staffing agency, not Coreslab. Tr. 572, 576-577. Johnson told Evans that he should leave the individual alone. Tr. 572. Johnson said this to Evans because he did not think a temporary employee was covered by the CBA. Evans responded to Johnson that Evans could talk to anyone he wanted. *Id.* Johnson then left the break room. Significantly, Evans and the temporary employee were still in the break room. Evans testified that the temporary employee signed an authorization card. This demonstrates that Johnson's statement to Evans did not have any effect on the temporary employee. Johnson's statement did not interfere with any Section 7 rights the temporary employee had. Johnson did not make any threats to Evans or the temporary employee. The temporary employee was not disciplined after this. Evans' right to visit the plant was not curtailed. In fact, Evan testified that Drews did not have any problem with him talking to employees. Tr. 165.

It is significant that Johnson was correct in his view that the Union did not represent the temporary employee. Article III, the Recognition clause of the now-expired CBA between the parties, provides that Union is the bargaining representative for "all production and maintenance employees, employed by the Company at its plant at 3206 North 129th East Avenue in Tulsa, Oklahoma…." JX-1. The undisputed record evidence is that this temporary employee was employed by a staffing agency, and was not employed by Coreslab. Johnson's actions did not interfere with the rights of any of the employees in the bargaining unit.

3. Coreslab's Responses to the Union's Requests for Information provided the Information Sought.

The evidence demonstrated that Coreslab produced information responsive to all of the Union's requests, save one – the request for the "trigger" for profit-sharing payments that Evans testified was part of his September 16, 2019 email. JX-17 (0276). At the time, Drews responded to this request by reiterating that Coreslab's proposal on profit-sharing had been withdrawn on September 12 when Drews told Evans that all proposals were off the table. R-17 (0276). Drews' response on September 16, 2019, that the company's proposals had been withdrawn did not violate the Act because any obligation that it had to provide the information ended with the withdrawal of recognition of the Union. *See Champion Home Builders Co*., 350 NLRB 788, 792-793 (2007); *Renal Care of Buffalo*, 347 NLRB 1284, 1286 (2006).

At the hearing, Evan testified that what he sought in the September 16, 2019 email was the "trigger" for profit-sharing payments in this email, although the email does not use that term. Tr. 105, 207; R-17 (0276). Evans testified, "that is what I am asking, is – is – when do they consider the profit? What is the trigger mechanism that says, 'Okay, boom. Everyone gets the profit-sharing.'" Tr. 106; see also Tr. 211. When Drews was questioned at the hearing about how the company decides if a profit-sharing payment will be made in a given year, and responded: "If the

company profits a dollar, somebody get the profit." Tr 325. Thus, Drews responded to this request by Evans for information on the "trigger" for profit-sharing payments. The Board has previously held that a partial response to a Union's information request is not improper when the Union's request is unclear as to what it seeks. *UPS*, 362 NLRB slip op. 22 (2015). That is precisely what happened here, and the same outcome – dismissing the allegation – must follow. As such, Coreslab did not fail to bargain in good faith in its responses to the requests for information from the Union.

IV. EXCEPTIONS APPLICABLE TO THE REMEDY ORDERED BY THE ALJ (Exceptions 28 to 37)

A. *The ALJ Erred in Ordering the Extreme Remedy of Notice-Reading.*

The ALJ's extreme remedies as set forth in the Decision (D. 14:15-19:10), are unsupported by a preponderance of the evidence on the record. The GC failed to establish that the Company has a proclivity to violate the Act, or has "engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357 (1979); *see also NLRB v. Blake Constr. Co., Inc.*, 663 F.2d 272 (D.C. Cir. 1981). Notwithstanding this absolute failure, the ALJ ordered extraordinary remedies where such remedies are not warranted and are improper.

The Board "reserves extraordinary remedies for cases involving unfair labor practices that are 'so numerous, pervasive, and outrageous' that 'special' remedies are necessary to 'dissipate fully the coercive effects of the unfair labor practices found.'" *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 935 (D.C. Cir. 2005) (finding General Counsel failed to justify need for extraordinary remedies). Extraordinary remedies may also be justified if a violation "has produced coercive effects chilling the free exercise of employee rights." *United Steelworkers of Am. v. NLRB*, 646 F.2d 616, 638 (D.C. Cir. 1981). None of these circumstances are present in this case. The Company does not have a "proclivity" to violate the Act. *Food Store Emps. Union, Local 347*

v. NLRB, 476 F.2d 546 (D.C. Cir. 1973); *Reno Hilton*, 319 NLRB No. 140 (1995); *Batavia Nursing Inn*, 275 NLRB No. 125 (1985); *Dee Knitting Mills, Inc.*, 214 NLRB No. 138 (1974). Indeed, these unfair labor practice charges are the first ones ever filed against Respondent.

The GC failed to establish "pervasive," "numerous," or "outrageous" misconduct sufficient to justify extraordinary remedies. In addition, the evidence at the hearing established that the Company has proven defenses to the allegations in the Complaint. The ALJ failed to articulate why traditional Board remedies are insufficient to cure the purported harm. *See Register Guard*, 344 NLRB 1142, 1146, n. 16 (declining to order notice-reading, despite multiple 8(a)(1) violations, including a hallmark unit-wide wage increase); *First Legal Support Services, LLC*, 342 NLRB 350, 350, n. 6 (2004) (declining to order additional remedies, including notice-reading, notwithstanding multiple violations, including repeated threats of discharge and plant closure and actual discharge of two union supporters, where "[n]either the General Counsel nor our dissenting colleague has shown that traditional remedies are so deficient here to warrant imposing" additional remedies). Here, it was error for the ALJ to order extraordinary remedies in this case, in that it involves primarily garden-variety 8(a)(1) allegations, rather than the extreme allegations that have justified imposition of extraordinary remedies in other cases.

B. *The ALJ Erred in Ordering the Extreme Remedy of an Affirmative Bargaining Order.*

An affirmative bargaining order is not warranted in this case. Under *Gissel*, a bargaining order is appropriate where an employer's unfair labor practices of have so decreased the chance of a fair election that the already expressed desires of employees for representation are a more reliable indication of free choice than an election would be. 395 U.S. 599, 603 (1969) ("cards, though admittedly inferior to the election process, can adequately reflect employee sentiment when that process has been impeded. . . ."). Specifically, the question is whether the unfair labor practices

are such that they leave only a slight chance that they can be remedied with traditional remedies in a manner that will ensure a fair re-run election, or rather, on balance, would a bargaining order based on the union's demonstrated card majority provide a better expression of employee sentiment. *Gissel*, 395 U.S. at 614. In making this determination it is appropriate to examine: (1) the seriousness of the violations, (2) the number of employees directly affected by the violations, (3) the size of the unit, (4) the extent of dissemination among the employees, and (5) the identity of the perpetrator of the unfair labor practice. *David Saxe Productions, LLC*, 370 NLRB No. 103 (2021); *Milum Textile Services Co.*, 357 NLRB 2047, 2055 (2011); *Holly Farms Corp.*, 311 NLRB 273, 281 (1993) (citing *FJN Mfg.*, 305 NLRB 656, 657 (1991)).

It is unquestioned that an affirmative bargaining order is an extraordinary remedy. *See, e.g., Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1461 (D.C. Cir. 1997). To support such a remedy, it must be demonstrated that the Board's traditional remedies would not erase the effects of the unfair labor practices so as to ensure a fair election. *See, e.g., Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1170 (D.C. Cir. 1998). Here, there is no evidence that the traditional remedy announced in *JCI* of holding an NLRB supervised election would be ineffective here. The D.C. Circuit has repeatedly stressed that the Board "must consider the appropriateness of a bargaining order *at the time the order is issued*." *Cogburn Health Center, Inc. v. NLRB*, 437 F.3d 1266, 1273 (D.C. Cir. 2006) (emphasis in original) (citing *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1079 (D.C. Cir. 1996); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 937 (D.C. Cir. 1991)). The ALJ has not done so here. Notably, the ALJ ignored that Union dues-paying bargaining unit employee numbers had steadily decreased prior to 2019: Union membership declined from 13 in January of 2017, to 9 in 2018, and finally to 8 in 2019. GC-11.

In *NLRB v. Gissel Packing Co*., 395 U.S. 575 supra, the Supreme Court distinguished between three categories of situations insofar as the propriety of granting a bargaining order to remedy an employer's unfair labor practices. The first category involved the "exceptional" case where "outrageous" and "pervasive" unfair labor practices are committed. The second category involves "less pervasive practices" that have a tendency to undermine majority strength and impede the election process. As to this second category, the Court held that a bargaining order would be proper to remedy an employer's unlawful conduct which had the effect of making a fair election unlikely where at some point the Union had majority support amongst the employees. The third class of cases, concern those where minor or less extensive unfair labor practices have been committed which would have a "minimal impact" on an election. The Court held that in the third category of cases, a bargaining order would be inappropriate to remedy an employer's unfair labor practices." *Hogan Transports, Inc*. 2014 L.R.R.M. (BNA 152499, 2014 WL 767778 (Feb. 26, 2014); *Denton Cty. Elec. Coop., Inc. v. NLRB*, 962 F.3d 161, 172-73 (5th Cir. 2020) (bargaining orders are "appropriate only in a category I or category II case"). The ALJ in the present case failed to explain how this matter is not a category III case. First, as previously discussed, the ALJ misapplied Board precedent as it relates to the Union having constructive knowledge about Respondent's profit-sharing plan through long-time Union steward Prince. Prince had both apparent and actual authority from the Union and acted as its agent. Second, assuming arguendo that they have merit, the unfair labor practices alleged that involve Danny Johnson and the request for information fall short of the *Gissel* standard for "category II" violations of the Act. It follows that "category III" is the applicable designation and a bargaining order is inappropriate.

CONCLUSION

For these reasons, Coreslab respectfully asks that the Amended Complaint, all amendments thereto, and all the underlying charges be dismissed in their entirety; that the Exceptions of Coreslab be granted; and that the Decision of the ALJ be reversed.

Respectfully submitted this 19th day of April, 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 19th day of April 2021, the foregoing pleading, **CORESLAB'S BRIEF IN SUPPORT OF EXCEPTIONS**, was filed by electronic filing with:

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